No. 04-1048

IN THE

Supreme Court of the United States

DAVID ENLOW,

Petitioners,

v.

SALEM-KEIZER YELLOW CAB, INC.
AN OREGON CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Respondent, Salem-Keizer Yellow Cab Co., Inc., has no parent corporation and no publicly held company owns 10% or more of Yellow Cab's stock.

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RESPONDENT'S STATEMENT OF THE CASE

This is an appeal from an order denying Petitioner David Enlow's motion for summary judgment based on a disparate treatment violation of the ADEA.

Respondent Salem-Keizer Yellow Cab, Inc. ("Yellow Cab") operates a taxi cab company in Salem, Oregon. Petitioner David Enlow ("Enlow") had been one of its cab drivers. His employment ended in 1999. At the time, Enlow was seventy-three years old.

Enlow *alleges* that Yellow Cab violated the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* ("ADEA"), when it terminated his employment based on a facially-discriminatory employment policy. In response to Enlow's motion for summary judgment, Yellow Cab *presented evidence* that it temporarily ended Enlow's employment in order to remain in business. Yellow Cab's evidence showed that, with little notice, it became aware that Enlow would not be covered by its newly-acquired insurance policy when insurance coverage of all its drivers was a requirement for continued operation under city regulations. The evidence also showed that, promptly upon acquiring this information, Yellow Cab took steps to make Enlow eligible for its coverage and, in the meantime, sought replacement employment for him. And it showed that Yellow Cab offered Enlow an opportunity for reemployment that he chose not to take. Yellow Cab expressly denies adopting or acting on a discriminatory policy; it further expressly denies that it knowingly purchased insurance coverage that would exclude Enlow because of his age. The trial court held that Yellow Cab's evidence was sufficient to avoid Enlow's summary judgment motion. The trial court's order was affirmed by the Ninth Circuit.

Enlow's arguments for certiorari are based on mischaracterizations of the case and of the Ninth Circuit Opinion from which he appeals. First, his argument assumes that it is settled fact that Yellow Cab acted on a facially-discriminatory policy in ending Enlow's employment when this is a matter of hotly-disputed fact. Enlow's phrasing of the issue asks this Court to turn the summary judgment standard on its head, resolve disputed facts from the evidence in the light least favorable to Yellow Cab, and apply the law to those "facts." Second, Enlow's argument that the Opinion creates a conflict among the Circuits depends on a mischaracterization of the Ninth Circuit's Opinion as approving of age discrimination based on economic factors when, in fact, the Opinion turns on the disputed factual issues regarding the nature of the employment action Yellow Cab took. The Opinion does not conflict with the decisions from other Circuits cited by Enlow. It can be distinguished procedurally (being a denial of a motion from summary judgment when each of the other appellate opinions follows a full trial) and by the nature of its ruling.

In essence, Enlow is calling the time and attention of this Court to a case that does not exist. In *this* case, it remains an open issue whether Yellow Cab intentionally discriminated against Enlow based on his age and, if so, whether Yellow Cab may be entitled to judgment after trial in its favor on a BFOQ or RFOA defense. The factual disputes inherent in such a case should be resolved by a trial on the merits.

REASONS FOR DENYING THE PETITION

I. This matter is not ripe for Supreme Court review because this appeal is not from a final judgment, but from an order denying summary judgment to Enlow.

This Court's discretion to accept review, though not exclusively reserved to final judgments by statute, is "to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 257-58 (1916). *See also, Forsyth v. City of Hammond*, 166 U.S. 506, 514 (1897) (discretion to accept review does not usually extend to matters of essentially "private interest"). The present appeal is not from a final judgment and does not present the sort of critical question justifying review of an interlocutory order.

Here, Enlow seeks review from an Opinion and Order of the Ninth Circuit affirming denial of his motion for summary judgment. The Ninth Circuit also overturned the grant of summary judgment for respondent because material disputes of fact as to Yellow Cab's motive precluded summary judgment for Yellow Cab. *Enlow v. Salem-Keizer Yellow Cab, Inc.*, 389 F.3d 802, 815 (9th Cir. 2004). None of the facts on which this Court's consideration should turn are settled or undisputed. In the guise of presenting a question of extraordinary importance, Enlow seeks what amounts to an advisory ruling on the law applicable to evidence yet to be presented at trial. At issue here is Yellow Cab's right to a trial on the merits. It is so entitled because the evidence presented in opposition to Enlow's summary judgment motion was sufficient to create disputed issues of material fact with respect to Enlow's claim. The trial court may still

decide, based on the evidence, that Enlow has not ultimately met his burden of proof. For that reason alone, a writ should not issue.

II. There is no present conflict among the Circuits calling for this Court's attention and resolution.

A. The Court of Appeals' decision affirming denial of Enlow's motion for summary judgment rested on disputed factual issues the resolution of which is threshold to application of the law, not on a matter of law in conflict with other Circuits.

Enlow's argument that this Court must address a conflict among the Circuits on the question presented fails because it depends on a mischaracterization of the Ninth Circuit Opinion and Order. Enlow characterizes the Opinion below as approving economic considerations as an excuse for intentional discrimination. (Petitioner at 8.) But the Court of Appeals makes no such decision. The Ninth Circuit affirmed trial court denial of Enlow's summary judgment motion on the basis that disputed factual issues preclude pre-trial application of the law to Enlow's claim. At the least, "[t]he evidence offered by Yellow Cab presents a genuine issue of material fact regarding whether it can demonstrate at trial that its employment decision 'falls within one of the exceptions to the ADEA's prohibitions.' " 389 F.3d at 814-15. The court goes on by way of explanation:

> Whether a BFOQ or RFOA defense will sustain a judgment in favor of Yellow Cab will depend on the resolution of disputed factual issues which can only be resolved by a trier of fact regarding the employment action Yellow Cab actually took, such

> as, whether Mr. Enlow's discharge was temporary or permanent, was subject to a medical test, did he refuse an offer of reinstatement, was he laid off solely for the time necessary for Yellow Cab to obtain insurance coverage for him, and whether it was prohibitively expensive to insure drivers over seventy. We cannot decide on the sharply disputed facts on this record which version of the facts will be persuasive to the jury, and which party should prevail on appeal as a matter of law. Thus, we express no view at this interlocutory stage of these proceedings regarding the principles of law that will be applicable after the jury has made its findings and we have a complete record of the relevant facts.

389 F.3d at 815.

Enlow is suing under the ADEA, claiming a violation under a disparate treatment theory that depends on proof that Yellow Cab acted on a facially-discriminatory employment policy to terminate his employment and that its action cannot be justified by recognized defenses to an ADEA claim. Here, there was evidence that Yellow Cab's decision was actually motivated by the need to keep its business license. Yellow Cab is defending on the basis that it had no facially discriminatory policy and that its temporary action with respect to Enlow was necessary to avoid losing its business license because all of its employees were not covered by automobile liability insurance. *See* 389 F.3d at 815. These issues have yet to be resolved.

Enlow's argument that a conflict exists among the circuits depends on a characterization of the Opinion below as one in a line of cost justification cases. When that characterization is shown false, the argument fails.

B. This is not a cost justification case. Just as it remains unsettled whether Enlow can prove that Yellow Cab acted pursuant to a facially-discriminatory policy, it remains to be seen whether Yellow Cab can justify its actions based on a recognized defense to Enlow's claim.

By implication, Enlow's argument anticipates that the outcome of the cases he cites from other circuits is determinative of the final outcome in this case. In light of the trial court's order denying Enlow's motion for summary judgment, and the Ninth Circuit's reversal of the trial court on Yellow Cab's summary judgment motion, nothing in this case is settled and the cases on economic considerations are procedurally and factually distinguishable.

They are procedurally distinguishable because, unlike this case, their reasoning is applied to settled facts, to final judgments reflecting the outcome of trials on their merits.

And they are factually distinguishable because they were each decided against employers who deliberately adopted discriminatory policies and then sought to justify those policies on cost bases. In *Smallwood v. United Airlines, Inc.*, 661 F.2d 303 (4th Cir. 1981), for example, the airline adopted a policy not to hire pilots over the age of 35. It argued that older, new-hire pilots generally presented safety issues and commensurate higher costs that amounted to a BFOQ.

It persuaded the trial court of its position, but that result was reversed on appeal. In *Metz v. Transit Mix, Inc.*, 828 F.2d 1202 (7th Cir. 1987), the employer made a deliberate decision to terminate an older employer to save his higher salary and sought to justify the decision based on the salary savings as a BFOQ. The Seventh Circuit reversed the trial court's judgment for the employer on the basis that the salary savings did not constitute a recognized, non-discriminatory justification for a replacement. The plaintiff's claim in *Leftwich v. Harris-Stowe State College*, 702 F.2d 686 (8th Cir. 1983), depended on a disparate impact theory that the employer's expressly-adopted plan for transferring employees discriminated against older workers. The employer argued, again, that the exclusion, proven as it had been by statistical evidence, was justified as a business necessity for the cost savings. Judgment for the employee followed a court trial, which result was affirmed by the Eighth Circuit. Enlow's argument based on *Tullis v. Lear School, Inc.*, 874 F.2d 1489 (11th Cir. 1989), has visceral appeal when, as in this case, insurance coverage is involved. But it is as distinguishable from this case as Enlow's other authorities because the evidence presented *at trial* established that the employer deliberately purchased insurance coverage that excluded older drivers in order to save money, then sought to justify the discrimination based on cost savings.

Each of these opinions followed trial on the merits of the claims and applied law to settled facts. In each case, the employer was proven to have intentionally, knowingly adopted an employment policy that discriminated against older workers and then sought to justify its intentional acts as defensible because of the associated cost savings. Those cases are not this case. Yellow Cab is not admitting

it enacted a facially-discriminatory policy in order to save costs.[1] Rather, it temporarily ended Enlow's employment in order to avoid losing its business license. The decision here was based, not on a carefully calculated policy, but on a reaction to inadvertent and exigent circumstances that threatened Yellow Cab's ability to conduct business.

The ADEA expressly anticipates that an employer may defend an age-based decision on "a bona fide occupational qualification reasonably necessary to the normal operation of the business, or where the differentiation is based on reasonable factors other than age . . ." 29 U.S.C. § 623(f)(1). The nature of Yellow Cab's action as non-discriminatory is a question of fact, *Schnidrig v. Columbia Machine Inc.*, 80 F.3d 1406, 1410 (9th Cir. 1996), as is the nature of its justification as a BFOQ[2] or RFOA. 389 F.3d at 814-15, *citing EEOC v. Santa Barbara*, 666 F.2d 373, 375 (9th Cir. 1982), *and EEOC v. Boeing Co.*, 843 F.2d 1213, 1216 (9th Cir. 1988).

Enlow's reliance on the legal inefficacy of cost justifications diverts the Court's attention from the true nature of this case. Because material disputes of fact remain to be resolved, and because none of the authorities cited by Enlow are determinative of the outcome, this case should proceed to trial.

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1. Even Judge Ferguson's dissent in the Ninth Circuit Opinion – which Enlow heavily relies on in his Petition – does not describe the employment action taken by Yellow Cab as adoption of a "policy." *See* 389 F.3d at 815-818.

2. Enlow argues at 12 that Yellow Cab may have waived any affirmative defense based on BFOQ. To the extent Yellow Cab's pleading may presently be insufficient on this point, it is still entitled to seek amendment under Fed. R. Civ. P. 15. Leave for amendment is "freely given when justice so requires." Fed. R. Civ. P. 15(a).

CONCLUSION

Supreme Court review is not warranted in this case. The appeal is based on an interlocutory order that does not present a question of critical importance or reflect a conflict among the Circuits calling for this Court's attention. Enlow's arguments for review presume that material facts of this case are settled when they are, in fact, disputed, and that the Ninth Circuit issued an opinion other than the one it published.

The Petition should be denied.

Respectfully submitted,

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